

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PROPET USA, INC.,)	CASE NO. C06-0186-MAT
)	
Plaintiff,)	
)	
v.)	ORDER DENYING PLAINTIFF'S
)	RENEWED MOTION FOR
LLOYD SHUGART,)	JUDGMENT AS A MATTER OF LAW
)	AND MOTION FOR A NEW TRIAL
Defendant.)	
_____)	

INTRODUCTION

A jury found in defendant Lloyd Shugart's (hereinafter Shugart) favor on his three counterclaims – copyright infringement, violation of the Digital Millennium Copyright Act (DMCA), and stolen/lost photographs. (Dkt. 136.) In so finding, the jury concluded that plaintiff Propet USA, Inc. (hereinafter Propet) did not have an unlimited license to use photographic images taken by Shugart. (*Id.*) Pertinent to this finding was a film delivery memo Shugart testified accompanied all of his copyrighted images and expressly limited Propet's use of the images, including, among other terms, a two-year duration of the license to use the images and a

01 requirement that the images be returned to Shugart. (*See generally* Trial Transcript at Dkts. 147
02 & 148.) Shugart also testified as to a seal on all film delivery packages that asserted his exclusive
03 rights and indicated that Propet's use and license was subject to all terms of the film delivery
04 memo. (*Id.*)

05 Now before the Court is Propet's Renewed Motion for Judgment as a Matter of Law and
06 Motion for a New Trial. (Dkt. 143). Having considered the papers filed in support and in
07 opposition to this motion, along with the remainder of the record, the Court hereby finds and
08 concludes as follows.

09 DISCUSSION

10 Propet renews its motion for a judgment as a matter of law pursuant to Federal Rule of
11 Civil Procedure 50(b). A judgment as a matter of law is warranted upon the Court's conclusion
12 "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party
13 on [an] issue[.]" Fed. R. Civ. P. 50(a). Stated another way, "[j]udgment as a matter of law is
14 appropriate when the evidence, construed in the light most favorable to the nonmoving party,
15 permits only one reasonable conclusion, which is contrary to the jury's verdict." *Omega Envtl. v.*
16 *Gilbarco, Inc.*, 127 F.3d 1157, 1161 (9th Cir. 1997) (citing *Vollrath Co. v. Sammi Corp.*, 9 F.3d
17 1455, 1460 (9th Cir. 1993)).

18 Propet also moves for a new trial pursuant to Rule 59. In deciding such a motion, the
19 Court looks to historically recognized grounds, including, but not limited to, "claims 'that the
20 verdict is against the weight of the evidence, that the damages are excessive, or that, for other
21 reasons, the trial was not fair to the party moving.'" *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729
22 (9th Cir. 2007) (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). The

01 Ninth Circuit Court of Appeals has held that “[t]he trial court may grant a new trial only if the
02 verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence,
03 or to prevent a miscarriage of justice.” *Id.* (quoting *Passantino v. Johnson & Johnson Consumer*
04 *Prods.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000)). This Court has “the duty . . . to weigh the
05 evidence as [the Court] saw it, and to set aside the verdict of the jury, even though supported by
06 substantial evidence, where, in [the Court’s] conscientious opinion, the verdict is contrary to the
07 clear weight of the evidence.” *Id.* (quoted sources omitted).

08 In this case, the Court finds no basis for either granting Propet a judgment as a matter of
09 law or ordering a new trial.

10 A. Copyright Infringement:

11 As agreed by the parties, to prove copyright infringement, the copyright owner must prove
12 ownership and copying. *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991).
13 “Because direct copying is difficult to prove, a [copyright owner] can satisfy the second element
14 by demonstrating that (a) the [infringing party] had access to the allegedly infringed work and (b)
15 the two works are substantially similar in both idea and expression of that idea.” *Id.*

16 Propet asserts the insufficiency of the evidence to establish copying in this case. It notes,
17 for example, that although testifying as to a total of twenty eight infringements found on Propet’s
18 website, Shugart provided testimony specific as to only six such instances and, with respect to two
19 of those instances, pointed to a picture that did not reflect one of his copyright registered
20 photographs and which he maintained, instead, was linked to such a photograph. (Dkt. 147 at
21 143-51.) Propet argues that this evidence, as well as testimony and evidence as to other purported
22 instances of infringement, is legally insufficient to prove copyright infringement or to support the

01 \$500,000 statutory damages award. Also, with respect to that award, Propet asserts the absence
02 of any finding of willful infringement and avers that the amount – some forty times the \$12,800
03 award of actual damages – is so excessive as to be unconstitutional. *See State Farm Mut. Auto.*
04 *Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (“[I]n practice, few awards exceeding a
05 single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy
06 due process.”)

07 The Court first notes that, although instructed as to the range of damages available for
08 copyright infringement generally and for infringement deemed willful or innocent (Dkt. 128 at 32-
09 34), the verdict form did not require the jury to specify the range it utilized in rendering its
10 statutory damages award (Dkt. 136 at 2-3). Accordingly, the jury may have found Propet’s
11 infringement willful and, consequently, found Shugart entitled to as much as \$150,000 for each
12 work found willfully infringed. *See* 17 U.S.C. § 504(c)(2). Therefore, even taking Propet’s
13 depiction of the evidence offered by Shugart as to only four instances of copying on Propet’s
14 website, the jury’s award may be explained.

15 The jury also had before it other evidence supporting a finding of infringement and the
16 damages awarded. For example, Shugart testified as to numerous instances of infringement on
17 third party websites and in Propet’s catalogs. (Dkt. 147 at 158-65.) Although Shugart did not,
18 as with Propet’s website, provide a specific comparison between each of those images and
19 corresponding images on his copyright registrations,¹ the jury had all of the relevant

21 ¹ In order to recover statutory damages, the copyrighted work must have been registered
22 prior to the commencement of the infringement, unless the registration is made within three
months after the first publication of the work. 17 U.S.C. § 412; *Polar Bear Prods. v. Timex*
Corp., 384 F.3d 700, 708 n.5 (9th Cir. 2004) (“Because Polar Bear did not register its copyright

01 documentation as exhibits to consider. Also, Propet's only witness – Jack Hawkins, the President
02 of Propet – repeatedly testified as to his belief that Propet owned all of the images at issue and
03 conceded that Shugart's images were shared with third parties. (Dkt. 148 at 327-30, 383-85,
04 402.) While not proving infringement, this testimony, taken together with all of the above, may
05 have been relevant to the jury's determination. Additionally, although Hawkins countered
06 Shugart's testimony in asserting that Propet's website did not contain any of Shugart's images and
07 that he believed all of the images had been reshot and replaced (*id.* at 388-90), the jury may well
08 have considered the absence of any supporting documentation or testimony, such as that from the
09 photographer(s) who purportedly reshot Shugart's images.

10 Finally, the case cited by Propet in support of its argument that the statutory damages
11 award is unconstitutional is inapposite to the election of damages in a copyright infringement
12 action. *See State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 424-26 (discussing awards of punitive
13 and compensatory damages in a case involving an insurance dispute). As the Court recently noted
14 in denying Propet's assertion of equitable defenses, “[b]ecause awards of statutory damages serve
15 both compensatory and punitive purposes, a plaintiff may recover statutory damages ‘whether or
16 not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped
17 by Shugart,’ in order “to sanction and vindicate the statutory policy” of discouraging
18 infringement.” *Los Angeles News Serv. v. Reuters TV Int’l*, 149 F.3d 987, 996 (9th Cir. 1998)
19 (internal citations to quoted sources omitted); *accord Columbia Pictures Indus. v. Krypton Broad.*

20 _____
21 before infringement, it can recover only actual damages and profits under § 504(b), not statutory
22 damages under § 504(c).”) In this case, the copyright registration date of April 10, 2006
controlled.

01 of *Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001) (“A plaintiff may elect statutory
02 damages ‘regardless of the adequacy of the evidence offered as to his actual damages[.]’”)
03 (quoting 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 14.04[A]).

04 In sum, Propet fails to support its contention as to a legally insufficient evidentiary basis
05 for the jury’s copyright infringement finding and statutory damages award, or to demonstrate that
06 the damages were excessive. Propet is not entitled to either a judgment as a matter of law or a
07 new trial on the copyright infringement counterclaim.

08 B. DMCA:

09 The DMCA provides that:

10 No person shall, without the authority of the copyright owner or the law--

11 (1) intentionally remove or alter any copyright management information,

12 (2) distribute or import for distribution copyright management information
13 knowing that the copyright management information has been removed or
altered without authority of the copyright owner or the law, or

14 (3) distribute, import for distribution, or publicly perform works, copies of
15 works, or phonorecords, knowing that copyright management information
has been removed or altered without authority of the copyright owner or the
16 law,

17 knowing, or, with respect to civil remedies under section [17 USCS § 1203], having
reasonable grounds to know, that it will induce, enable, facilitate, or conceal an
18 infringement of any right under this title.

19 17 U.S.C. § 1202(b). In this case, although Shugart averred violations of all three prongs of
20 § 1202(b) in his DMCA counterclaim (Dkt. 13 at 9), it was apparent at trial that he alleged the
21 intentional removal of his copyright management information in violation of § 1202(b)(1). The
22 verdict form reflected as such, asking whether Propet knowingly or intentionally removed any

01 copyright management information from Shugart's photographs. (Dkt. 136 at 2.)

02 Propet asserts that Shugart failed to proffer evidence that it intentionally removed
03 copyright management information and that the removal was done to induce, enable, facilitate, or
04 conceal an infringement, and argues that such failure is fatal to this counterclaim. *Gordon v.*
05 *Nextel Communs.*, 345 F.3d 922, 927 (6th Cir. 2003); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d
06 1116, 122 (C.D. Cal. 1999), *aff'd and rev'd in part on other grounds*, 336 F.3d 811 (9th Cir.
07 2003). It maintains that Shugart's testimony that Ken Johnson, a former employee of Propet, had
08 software that enabled him to remove copyright management information was legally insufficient
09 to establish that Johnson knowingly and intentionally did anything to induce, enable, facilitate or
10 conceal an infringement. Propet further notes that Shugart failed to, for example, introduce
11 evidence showing images with his copyright management information and images from Propet's
12 website with that information removed, and asserts that Shugart, instead, simply testified that it
13 occurred more than two hundred times (*see* Dkt. 147 at 171). Propet argues that the \$500,000
14 jury award on this counterclaim was unreasonable, does not represent substantial justice, and is
15 excessive and against the weight of the evidence.

16 As noted by Shugart, in addition to establishing that Propet intentionally removed
17 copyright management information, Shugart was required only to establish that Propet had
18 "reasonable grounds to know" that the removal would induce, enable, facilitate or conceal an
19 infringement. 17 U.S.C. § 1202(b). Shugart avers that the jury had ample evidence upon which
20 to base a conclusion that those reasonable grounds existed. He points to evidence of Propet's
21 awareness as to issues of copyright, including the fact that it attached its own copyright notice to
22 posters created based on Shugart's images and Hawkin's testimony that Propet routinely hired

01 specialized legal counsel in intellectual property matters (Dkt. 148 at 306-07, 313-14), the fact
02 that Propet is a multinational corporation with sales approaching thirty million dollars annually (*id.*
03 at 336), and evidence Johnson had actual knowledge of Shugart's copyright ownership in the
04 images, such as that supporting the contention that Johnson requested a release to allow Propet
05 to scan images and used the film delivery memo as the release (Dkt. 147 at 121-22). The Court
06 agrees that this and the totality of the evidence presented provided a sufficient basis for the jury
07 to conclude that Propet had reasonable grounds to know that the removal of copyright
08 management information would induce, enable, facilitate, or conceal an infringement.

09 Shugart further points to evidence supporting his claim that Propet intentionally removed
10 his copyright management information, including his testimony that every digital image he
11 delivered to Propet contained embedded copyright management information, that the information
12 was embedded automatically by his digital camera, and that Johnson had the knowledge, expertise,
13 and tools that would allow the removal of such information from digital images. (*Id.* at 170 and
14 232.) He also asserts the absence of evidence to the contrary, other than Harkin's testimony that
15 he had no knowledge that any copyright management information had been removed and that he
16 did not think Propet had the personnel who would know how to remove it. (Dkt. 148 at 391.)

17 Again, the Court agrees that there was a sufficient evidentiary basis upon which the jury
18 could conclude that Propet intentionally removed Shugart's copyright management information.
19 In addition to the above, Shugart described the technique he utilized in determining that more than
20 two hundred of his images had his copyright management information removed, a technique which
21 involved opening up each image in a meta data editor and seeing that the copyright management
22 information had been stripped. (Dkt. 147 at 165-68.) He further described the process by which

01 the information would be removed, the type of software that could be utilized to remove the
02 information, and the fact that Johnson had that software and utilized it to create and resize images
03 for Propet's catalogs and website. (*Id.* at 169-71 and 232-33.) Taken as a whole, the evidence
04 provided a sufficient foundation upon which to conclude that Propet violated § 1202(b)(1) of the
05 DMCA.

06 The cases cited by Propet in support of its DMCA arguments are readily distinguishable.
07 In one case involving § 1202(b)(3), the court concluded that, if § 1202(b)(1) had applied, the
08 plaintiff would have failed to show that any removal of copyright management information was
09 intentional, as opposed to an unintentional side effect of the “visual search engine” at issue in that
10 case. *Kelly*, 77 F. Supp. 2d at 1122. The search engine retrieved only “thumbnail” images
11 without the corresponding descriptive text, wherein the copyright management information for the
12 images was contained. *Id.* at 1117. There was no evidence presented in this case that would
13 support the removal of copyright management information in a similar circumstance. In the other
14 case cited, the court noted the absence of any evidence to counter testimony that the party accused
15 of violating the DMCA had no reason to know that the removal of a copyright notice would
16 facilitate or conceal an infringement. *Gordon*, 345 F.3d at 927 (“Rather, when Crossroads
17 obtained the poster from the prop company, its personnel believed that the poster had been cleared
18 for use in television commercials. . . . Furthermore, McCarthy asserts that it was his practice to
19 obtain permission from an artist if the artwork was not obtained from a prop house, and that he
20 would have sought Gordon's approval if he thought there was a clearance issue in this case.”)
21 Here, in contrast, Shugart's testimony remained substantively undisputed.

22 Finally, as argued by Shugart, the evidence provided sufficient support for the damages

01 award. That is, based on Shugart's testimony as to an excess of two hundred images and the fact
02 that the jury could have awarded statutory damages of between \$2,500 and \$25,000 per violation,
03 17 U.S.C. § 1203(c)(3)(B), the \$500,000 damages award may be explained.

04 As with the copyright infringement counterclaim, Propet fails to support its contentions
05 as to the DMCA finding and award of damages. Propet is not entitled to either a judgment as a
06 matter of law or a new trial on the DMCA counterclaim.

07 C. Stolen/Lost Photographs:

08 Propet contends that the counterclaim as to stolen/lost photographs is legally deficient as
09 a matter of law. It points to the language specific to this counterclaim in Shugart's pleading – that
10 Shugart had demanded the return of all images provided to Propet, that Propet had returned only
11 some of those images, and that Shugart was entitled to compensation for the theft or loss of the
12 images not returned (Dkt. 13 at 9-10) – and asserts the absence of any cognizable cause of action.
13 Propet maintains its inability to prepare a defense given this inadequate pleading and rejects the
14 Court's previous recognition that the claim arose out of the film delivery memo, asserting this was
15 never plead by Shugart. Propet further asserts that the jury's \$303,000 award was based on
16 speculation and excessive given an absence of evidence proffered and absence of instructions as
17 to the elements of proof. However, all of these arguments fail.

18 Under the terms of notice pleading, Federal Rule of Civil Procedure 8(a)(2) requires only
19 "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific
20 facts are not necessary; the statement need only "give the Shugart fair notice of what the . . .
21 claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007)
22 (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (quoting *Conley v.*

01 *Gibson*, 355 U.S. 41, 47 (1957)).

02 In arguing the insufficiency of Shugart's pleading, Propet attempts to divorce the language
03 specific to this counterclaim from the remainder of the pleading. Throughout the Answer and
04 Counterclaim Shugart clearly set forth his position that Propet's use of the images at issue was
05 subject to a limited license, the terms of which were contained within the film delivery memo, and
06 that Propet failed to comply with the terms of that license. (*See, e.g.*, Dkt. 13 at 3 (asserting
07 Shugart had a license to use the images and denying the absence of a written agreement) and at
08 7 ("Propet USA's use of images has always been subject to the terms of a written agreement, the
09 Film Delivery Memo. That agreement defines rights and ownership of the film and all images
10 created. The Film Delivery Memos were transmitted by Shugart with the final film and invoice
11 to Propet USA. At all times, Shugart has granted only a limited license to Propet USA for certain
12 usages by Propet.")) The pleading as a whole may be read to relate the stolen/lost photographs
13 counterclaim to the dispute over the film delivery memo, which called for the return of all
14 photographic materials supplied by Shugart and assigned value to lost or damaged materials. As
15 such, Propet had sufficient notice as to this counterclaim.

16 Nor was the jury insufficiently instructed. Ten different instructions addressed the dispute
17 as to a contract and the license at issue in this case (Dkt. 128 at 17-26) and an additional
18 instruction specifically pertained to the stolen/lost photographs counterclaim (*id.* at 39 ("If you
19 find that Propet did not have an unlimited license and failed to return film and/or images that were
20 owned by Mr. Shugart and that had been delivered to Propet, then you should ascertain a value,
21 if any, for each such lost film and/or image. The value you attach to the lost film and/or images
22 should be based on the evidence that was presented at trial.")) Propet fails to demonstrate the

01 insufficiency of these instructions.

02 Propet also fails to support its contention that the jury award was speculative or excessive.
03 As argued by Shugart, the jury had before it not only Shugart's undisputed testimony as to 972
04 films not returned (Dkt. 147 at 171-74),² but also relevant documentary evidence, including
05 invoices itemizing all of the film Shugart sent to Propet (Trial Exhibit 65) and a box returned to
06 Shugart containing only a portion of the total amount of film (Trial Exhibit 48.1).

07 The jury had a sufficient evidentiary basis to find for Shugart on the stolen/lost
08 photographs counterclaim and to find Shugart entitled to the amount of damages awarded. Again,
09 Propet is not entitled to either a judgment as a matter of law or a new trial as to this counterclaim.

10 D. Film Delivery Memo:

11 Propet also requests that the Court set aside the jury's finding that it did not receive an
12 unlimited license. Pointing to Shugart's admission that he entered into oral agreements to take
13 photographs for Propet (Dkt. 147 at 211-13) and the instruction describing the need for mutual
14 assent to contract modification (Dkt. 128 at 25), Propet asserts the absence of any evidence it
15 assented to the additional terms contained within the film delivery memo. Propet avers that it was
16 unreasonable for the jury to conclude that it agreed to modify its oral contract with Shugart, that
17 substantial justice has not been done through the enforcement of the film delivery memo, and that
18 the verdict is against the weight of the evidence.

19 Shugart responds that this argument must be rejected because it was not presented in
20 Propet's original motion for a judgment as a matter of law. However, the argument was discussed

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22 ² As noted above, Hawkins repeatedly testified as to his belief that Propet owned all of the
images at issue. (Dkt. 148 at 327-30, 383-85, 402.)

01 at least indirectly at trial, at the prompting of the Court. (Dkt. 148 at 351-55.) Yet, even if
02 appropriately considered here, the Court finds no basis to support Propet's motions with respect
03 to this issue.

04 The jury was instructed on the factors pertinent to contract formation, including a promise,
05 mutual assent, and consideration, as well as factors relating to contract interpretation and
06 modification. (Dkt. 128 at 18-25.) The jury instruction pointed to by Propet indicated that, once
07 a contract had been entered into, mutual assent was required for modification, which could be
08 shown through the words or conduct of the parties. (*Id.* at 25.) Other instructions similarly
09 directed the jury to consider the conduct of the parties, as well as surrounding circumstances. For
10 example, the instruction on implication of mutual assent from circumstances stated:

11 A contract may arise by inference or implication from circumstances such as the
12 ordinary course of dealing between the parties or the common understanding within
13 a commercial or social setting which shows a mutual intention on the part of the
parties to contract with each other. Thus, mutual intention may be deduced from
circumstances.

14 (*Id.* at 21.) The instruction on contract interpretation directed the jury as follows:

15 You are to determine the intent of the contracting parties by viewing the contract as
16 a whole, considering the subject matter and apparent purpose of the contract, all the
17 facts and circumstances leading up to and surrounding the making of the contract, the
subsequent acts and conduct of the parties to the contract, and the reasonableness of
the respective interpretations offered by the parties.

18 (*Id.* at 24.)

19 Here, Propet points to testimony as to initial oral agreements regarding photographic
20 projects; the testimony does not reflect Shugart's admission that a contract was formed and/or
21 finalized at that time, or that it was not later modified. (Dkt. 147 at 211-13.) The jury was
22 presented with evidence as to the conduct of the parties and other circumstances over a number

01 of years. That evidence included Shugart's testimony that he included the film delivery memo
02 with each invoice he directed to Propet and the fact that Propet paid each of those invoices.
03 Taking the evidence as a whole and all of the relevant instructions into consideration, the Court
04 concludes that Propet presents only one possible interpretation of the evidence as to the contract
05 at issue in this case. For example, as reflected in a previous Order, Washington courts recognize
06 the formation of "layered contracts" which may be evidenced by implication through a course of
07 dealing between the parties. *See, e.g., Puget Sound Fin. v. Unisearch, Inc.*, 146 Wash.2d 428,
08 437-38, 47 P.3d 940 (2002) (concluding that, through either a trade usage or course of dealing
09 analysis, limited liability provisions included on search reports and sales invoices could be read into
10 a contract for services; citing *M. A. Mortenson Co. v. Timberline Software Corp.*, 140 Wash.2d
11 568, 571, 584, 998 P.2d 305 (Wash. 2000), as supporting the conclusion that an agreement
12 between two entities "could be interpreted as a 'layered' contract, which incorporates the search
13 reports and sales invoices.") *See also Discover Bank v. Ray*, 139 Wn. App. 723, 727, 162 P.3d
14 1131 (Wash. Ct. App. 2007) ("[T]he offeror may propose acceptance by conduct, and the buyer
15 may accept by performing those acts proposed by the offeror."; concluding that, where credit card
16 agreement clearly and unambiguously provided that use of the card constituted acceptance of the
17 agreement and the defendant used the card for several years, there was sufficient evidence to
18 establish that the defendant accepted the terms of the agreement through his conduct of using the
19 credit card).

20 In sum, Propet fails to demonstrate that the jury's verdict was unreasonable or
21 unsupported. Thus, Propet's motions as they relate to the film delivery memo also fail.
22

01 E. Evidentiary Rulings:

02 Propet asserts error in several evidentiary rulings made by the Court, including the decision
03 to grant Shugart's motion in limine preventing the introduction of state court and bankruptcy court
04 records. Propet states that these records indicate Shugart has been named as a Shugart some "two
05 dozen times over the years" (Dkt. 143 at 3), a fact relevant to Shugart's credibility, a key issue in
06 this case. It further states: "While one or two records of this kind might not be probative, the fact
07 that Shugart has many records involving multiple numbers of plaintiffs asserting claims against
08 him, suggests he is not credible." (*Id.*)

09 Yet, in responding to Shugart's motion in limine, Propet made no mention of two dozen
10 state court matters – it pointed to "several" child support matters and Shugart's bankruptcy
11 proceeding. (Dkt. 99 at 2-3.) Had Propet wished the Court to consider other proceedings, it
12 should have briefed the issue accordingly. Moreover, the Court adds that, in considering Propet's
13 response to Shugart's motion in limine, it found significant that the one example purporting to
14 demonstrate Shugart's lack of credibility in a child support proceeding was not particularly
15 compelling or definitive as evidence that Shugart had deliberately intended to present a falsehood.
16 (*See id.* at 3 (quoting a declaration filed by an attorney in one proceeding stating: "On December
17 6, 2006, Mr. Shugart appeared before the Mason County Superior Court. Mr. Shugart
18 represented to the Mason County Superior Court that the Connie White child support obligation
19 was being handled by the King County Prosecutor. This statement was proven false. The King
20 County Prosecutor was pursuing Mr. Shugart for not paying child support for a different woman
21 and child.")) The Court stands by its previous conclusion that any probative value of this evidence
22 was substantially outweighed by the potential for prejudice. Fed. R. Evid. 403.

01 Propet elsewhere in its motion cursorily challenges the admission of various pieces of
02 documentary evidence. (*See* Dkt. 143 at 5.) However, again, the Court stands by its rulings.
03 Neither these arguments, nor the argument relating to Shugart's state and bankruptcy court
04 matters warrant a new trial.

05 F. New Evidence:

06 In its final argument, Propet asserts that the existence of newly discovered evidence
07 justifies a new trial. It asserts that such evidence (1) must be material and not merely cumulative,
08 (2) could not have been discovered before trial through the exercise of reasonable diligence, and
09 (3) would probably have changed the outcome of the trial. *Edgar v. Finley*, 312 F.2d 533, 537
10 (8th Cir. 1963).

11 Propet first points to testimony from Shugart as to an unsigned contract. Propet construes
12 Shugart's testimony as indicating that he gave his former attorney a copy of an unsigned contract
13 between Propet and himself apart from the film delivery memo. It asserts the significance of such
14 a document to both the claims at issue in this case generally and Shugart's credibility.

15 However, Propet misconstrues Shugart's testimony. Shugart consistently maintained that
16 he had been unable to find such a document, and explained an answer he gave in a deposition as
17 referring to a copy of his standard contract:

18 Q And you remember answering me, quote, Well, sure I have an unsigned copy,
19 end quote?

20 A Yes. *And I think you asked about my standard contract.*

21 Q And you've never produced the unsigned copy either, have you?

22 A Again, I delivered it to my previous attorney. I don't know if he delivered it
to you or not.

01 (Dkt. 147 at 244-47 (emphasis added).)

02 Shugart provides a copy of an unsigned contract between himself and a third party
03 unrelated to Propet and this case, as well as a letter reflecting that that document was produced
04 in April 2007. (Dkt. 154, Ex. A.) He maintains that this was the document he referred to in his
05 testimony and which was shown to Propet's counsel at trial. Discussing this issue at trial, Propet's
06 counsel indicated that he had been handed something by Shugart's current counsel. (Dkt. 148 at
07 376.) Propet does not provide a copy of the document its counsel was shown during trial, nor
08 does it otherwise support the suggestion that there is a copy of an unsigned contract between the
09 parties in the possession of Shugart or his former or current counsel. This argument does not
10 support the existence of new evidence warranting a new trial.

11 Propet also seeks a new trial based on the existence of a matrix of damages Shugart
12 attempted to introduce into evidence at trial. It notes that it repeatedly sought to obtain such a
13 document prior to trial and avers that a new trial should be ordered given that Shugart was
14 allowed to testify about information contained in the matrix. However, the Court sustained
15 Propet's objection to the admission of this evidence at trial. (*Id.* at 301-03.) Propet fails to
16 explain why, given that it succeeded in its objection to this evidence, a new trial would now be
17 warranted. Accordingly, the Court finds no basis for granting Propet's motion for a new trial
18 based on newly discovered evidence.

19 CONCLUSION

20 For the reasons described above, the Court hereby DENIES Propet's renewed motion for
21 a judgment as a matter of law and motion for a new trial. (Dkt. 143.) The Clerk is directed

22 ///

01 to send copies of this Order to counsel for Propet and Shugart.

02 DATED this 13th day of December, 2007.

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04 Mary Alice Theiler
05 United States Magistrate Judge
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